

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment reserved on :07.08.2015*
Judgment delivered on:13.08.2015

+ CRL.A. 887/2012

MAHAVIR PRASAD

..... Appellant

Through Mr.L.K.Singh, Advocate.

versus

STATE & ORS

..... Respondents

Through Ms.Kusum Dhalla, APP for the
State.

Mr.Aseem Bhardwaj and
Mr.Amit Kumar Tanwar,
Advocates for R-2 to R-4.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

1 This appeal is directed against the impugned judgment dated
27.04.2012 wherein the respondents Ravi Kant, Shyam Lal and Sandeep
Kumar stood acquitted of the charges which had been framed against

them under Section 308/34 of the IPC.

2 Before advertng to the factual matrix of the case, it would be relevant to note the proposition of law on this subject. The order of acquittal cannot be easily interfered with. It is only if there is grave perversity or infirmity which is glaring on the face of the record that the order of acquittal can be interfered. A presumption of innocence cannot be disturbed unless some cogent evidence is forthcoming.

3 In this context, the observations of the Apex Court in ***Jaswant Singh v. State of Haryana*** (2000) 4 SCC 484 are relevant and read herein as under:-

“The following principles have to be kept in mind by the Appellate Court while dealing with appeals, particularly, against the order of acquittal:

- (i) There is no limitation on the part of the Appellate Court to review the evidence upon which the order of acquittal is found.*
- (ii) The Appellate Court in an appeal against acquittal can review the entire evidence and come to its own conclusions.*
- (iii) The Appellate Court can also review the Trial Court's conclusion with respect to both facts and law.*
- (iv) While dealing with the appeal preferred by the State, it is the duty of the Appellate Court to marshal the entire evidence on record and by giving cogent and adequate reasons set aside the judgment of acquittal.*
- (v) An order of acquittal is to be interfered only when there are "compelling and substantial reasons" for doing so. If the order is "clearly unreasonable", it is a*

compelling reason for interference.

(vi) While sitting in judgment over an acquittal the Appellate Court is first required to seek an answer to the question whether finding of the Trial Court are palpably wrong, manifestly, erroneous or demonstrably unsustainable. If the Appellate Court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the Appellate Court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities, it can reappraise the evidence to arrive at its own conclusion.

(vii) When the Trial Court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of Ballistic Experts etc., the Appellate Court is competent to reverse the decision of the Trial Court depending on the materials placed.”

4 Record shows that Mahavir Prasad/complainant who was running a departmental store had purchased a shop at Dakshin Puri from the accused Ravi Kant and Sandeep. On 24.03.2008, both the aforementioned accused came to the shop of the complainant and asked him to give Rs.50,000/-, the balance amount of the consideration. The complainant told them to pay the pending electricity and water bills, give the inverter and cylinder and thereafter he would pay the balance amount. Accused person left after abusing him. They called their companions who were having dandas in their hand and started hurling abuses on the complainant. Ravi Kant and Sandeep took dandas from their accomplices and started giving danda blows to the complainant. The

complainant tried to save himself. His brother Gopal Dass (PW-2) reached the spot. 100 number was called. Accused persons ran away. It was on the basis of the complaint that the FIR was registered.

5 11 witnesses were examined of whom the star witness was PW-1. His brother was examined as PW-2. The medical record was proved through Dr. Arundeeep Arora (PW-9) and Dr. Suman Karmakar (PW-11). The medical record evidences that an X-ray of the victim had been conducted on 24.03.2008 as there was a fracture on the lower end of both ulna bone. Injuries were reported to be grievous. Testimony of PW-1, the complainant and that of PW-2, his brother has been appreciated in detail. Testimony of Inderdev Chaudhary, the beetel shopkeeper examined as PW-6 and Sachin Garg, the nephew of PW-1 (PW-4) has also been appreciated. These were the two other public witnesses apart from PW-1 & PW-2. The trial Judge had noted material contradiction in the version of PW-1 & PW-2. The findings are returned herein as under:-

“25. Complainant (PW1) deposed that two accomplices of the accused Ravi Kant and Sandeep had come with dandas which they gave to accused Ravi Kant and Sandeep and it were the two accused Ravi Kant and Sandeep who assaulted him with dandas, as detailed herein before. In his entire testimony

complainant (PW1) did not whisper of the two accomplices of accused Ravi Kant and Sandeep having given any blow by dandas or any beating on his person.

26. Gopal Dass Bansal (PW2) in his entire testimony did not whisper of any danda (s) in hands of either accused Sandeep or accused Ravi Kant or their two accomplices or any such danda having been used for giving any blow on the person of Mahavir Prasad (PW1) or the two accomplices having handed any danda (s) to PW1. Instead Gopal Dass Bansal (PW2) testified that accused Ravi Kant and Sandeep as well as their two accomplices i.e. four persons altogether were giving beatings to complainant (PW1). Neither PW2 intervened nor took any step to save his brother complainant (PW1) from the clutches of the said four persons, as alleged. It is also not borne out of the deposition of Gopal Dass Bansal (PW2) that any of the accused had assaulted complainant (PW1) on his head or while complainant (PW1) tried to save himself with his hands, he (PW1) received any danda blow on his hands from any of the accused.

27. Inderdev Choudhary (PW6) in his deposition asserted of assailants to be the three accused of which one accused he identified as accused Sandeep by name. When testimony of PW6 is read in entirety, it is revealed that he had allegedly witnessed the occurrences since inception till police arrived. As per PW6, upon arrival three accused started quarreling, beating (doing maarpeet) with PW1. PW6 did not whisper of any accused having hurled abuses or having demanded any sum much less Rs 50,000/ or any conversation inter-se accused and PW1 having taken place regarding asking of PW1 to give back inverter, four gas cylinders and to clear electricity and water dues, only upon which Rs 50,000/ would be paid by PW1 to said accused. Also Inderdev Choudhary (PW6) stated that on arrival police said "bhago bhago" upon which he closed his shop and went away. PW6 candidly admitted in the course of his cross examination that on the day of his examination, PW1 explained him his statement and what he had to depose. Also, PW6 admitted that even before his

evidence PW1 had pointed out accused Sandeep and had told PW6 that he was accused Sandeep. It is established and proved on record that PW6 was a tutored witness.

28. The investigating officer, ASI Subhash Chand (PW3) testified that when he reached at the scene of crime mostly shops were closed, only a hotel was open from where he had enquired about injured. Complainant/injured feigned ignorance when asked whether at the time of occurrence liquor shop in the market was being run or not. PW6 admitted that there was a liquor shop in the DDA Market at the place of occurrence during those days which used to remain open till 10 or 10.30 pm where many persons remained there for purchasing liquor. Also PW6 admitted that outside shops of DDA Market, Mount Kailash there was no source of light. In the course of evidence of Inderdev Choudhary (PW6), it was seen that he was having no marks on any of his fingers or thumb suggestive of regular or consistent use of Kathha, he being beetle vendor by profession.

29. Accused Shyam Lal was not named in the lodged first information report. Accused Shyam Lal was even not known to any of the material witnesses PW1, PW2 and PW6 prior to the occurrence. Identification features viz., height, weight, built, complexion, age, wearing apparels of accused Shyam Lal were not disclosed by complainant/injured (PW1), Gopal Dass Bansal (PW2) and Inderdev Choudhary (PW6) in their statements to police in the course of investigation.

30. Gopal Dass Bansal (PW2) deposed that he had seen accused Shyam Lal in police station on 25/03/2008 when he had gone there where he had identified him. Complainant/injured (PW1) deposed that after a week of occurrence, he was called by the police when accused Shyam Lal and Ravi Kant were arrested and then he identified accused Shyam Lal at police station. Also complainant (PW1) testified that he was knowing Shyam Lal by face and not by name at the time of occurrence as at the time of

aforesaid deal of shop, Shyam Lal accompanied the accused.

31. *As per presented case of prosecution, accused Shyam Lal was arrested on 31/03/2008 at 6 pm beneath Mool Chand Flyover and was produced before Metropolitan Magistrate on 01/04/2008 and sent to jail till 02/04/2008. On 02/04/2008, accused Shyam Lal refused for participation in the Test Identification Parade proceedings (admitted document during course of trial) Ex AD1, gave statement that he had been shown to witnesses by the police in the police station. Since PW2 categorically admitted that he had seen accused Shyam Lal in the police station on 25/03/2008; PW1 categorically admitted having seen accused Shyam Lal in police station after about one week of occurrence on his arrest and being called by the police there, refusal of accused Shyam Lal to participate in Test Identification Parade appears fully justified and it is proved on record that steps taken for getting organized Test Identification Parade by officers of investigating agency were farce, since accused Shyam Lal had been shown to witnesses PW1 and PW2 in the police station before his production in the court for test identification parade.*

32. *As per X ray report Ex PW9/A films of Xray were taken at 1.40 am and 1.50 am respectively on 25/03/2008. Dr Suman Karmakar (PW11) admitted that on Xray plate the date mentioned was 25/03/2008. The investigating officer, ASI Subhash Chand (PW3) testified that he left the hospital around 11 pm to 11.15 pm on 24/03/2008 after he had obtained the MLC Ex PW10/A of PW1 and thereafter he had reached the spot between 11.15 pm to 11.30 pm, consequent upon which he had prepared site plan, Ex PW3/B at the instance of Gopal Dass Bansal (PW2) who accompanied him to the spot from the hospital. Tehrir Ex PW3/A embodies version of ASI Subhash Chand (PW3) of having dispatched it at 11.40 pm from AIIMS hospital through Ct Satinder and then PW3 having left for scene of crime. It belies own version of PW3, as aforesaid. In the testimony of PW3 there is no account of PW3 having tendered*

MLC Ex PW10/A for opinion after he had obtained the MLC in the night of 24/3/2008 any time or any day later.

33. Admittedly, no Crime Team was called at the spot, scene of crime was not photographed. None amongst the PCR officials who had taken the injured/complainant (PW1) or his brother Gopal Dass Bansal (PW2) from the place of occurrence to the AIIMS hospital were enquired nor their statements were recorded in the investigation. As per Inderdev Choudhary (PW6), there was vegetable booth of Safal adjacent to Mount Kailash, DDA Market, ahead of which police barricades were being put up by the police for routine check up. As per Inderdev Choudhary (PW6) on the night of occurrence, police persons were there at the said place at the time of occurrence though barricades were not there. None amongst said police persons reached the scene of crime at the time of occurrence nor were made witnesses in the course of investigation nor cited as prosecution witnesses.

34. Facts germane and embodied in the afore elicited Police Control Room form reflect vivid and different version of the occurrence as to the presented case of prosecution. It was bounden duty of the investigating agency to have examined the officers of the Police Control Room who had taken the complainant/injured accompanied by his brother in their official vehicle to AIIMS hospital in the back drop of the present set of facts and circumstances. Infirmities in the testimony of investigating officer ASI Subash Chand (PW3) clearly suggest of the first information report to be ante timed and as well incorporating coloured version, exaggerated account or concocted story as a result of deliberation and consultation inter se first informant complainant/injured (PW1) and his brother Gopal Dass Bansal (PW2) and others.

35. The afore elicited information in the form of Police Control Room, dated 24/03/2008 inter alia embodied the assailants to be 10/20 boys in number who also removed 6/7 thousand rupees from the cash box of the shop of complainant (PW1) while amongst them PW1 could identify one

person.. Had accused Sandeep and Ravi Kant been amongst those 10/20 boys, who assaulted PW1, there was no impediment for complainant/injured (PW1) to have named them in the information given to the escorting PCR official in the PCR van to have formed the information recorded in the Police Control Room form, aforesaid since complainant (PW1) was knowing accused Ravi Kant and Sandeep fully well prior to the occurrence.

36. It is not officers of investigating agency who have brought on record the documents of alleged sale of shop to complainant/injured Mahavir Prasad (PW1) and his nephew Sachin Garg (PW4). Instead Sachin Garg (PW4) in the course of his examination brought on record the copies of documents namely GPA Ex PW4/A, agreement to sell, will, affidavit, indemnity bond, receipt and possession letter, all dated 30/01/2008, collectively Ext PW4/C (colly) in respect of shop no. 13, Local Shopping Centre, Dakshinpuri executed by accused Ravi Kant in favour of Sachin Garg (PW4). Similarly copies of the agreement to sell, will, affidavit, indemnity bond, receipt and possession letter collectively Ex PW4/D(colly) whose GPA Ex PW4/B were executed by one Vinod Kumar in favour of complainant /injured (PW1) in respect of shop no. 14, Local Shopping Centre, Dakshin Puri. Sachin Garg (PW4) in the course of his examination admitted that in the documents Ex PW4/A, PW4/B, PW4/C (colly), PW4/D (colly), there was no mention of any amount being outstanding or to be paid by purchaser to seller nor there was mention that the purchaser was to receive any goods i.e., generator, cylinders. In terms of aforesaid documents Exts PW4/A, PW4/B, PW4/C (colly) and PW4/D (colly), there was no privity of contract inter se complainant/injured (PW1) on one hand and any of the accused Ravi Kant and Sandeep on the other hand. Per contra to the documentary evidence, aforesaid embodied in Exts PW4/A to PW4/D (colly) the complainant/injured (PW1) deposed of having purchased shop at Dakshin Puri from accused Ravi Kant and Sandeep. In fact as per agreement to sell, forming part Ex

PW4/D (colly) complainant/injured had purchased shop from one Vinod Kumar, son of Sh Ram Bilas, R/o LIG 9139, Vasant Kunj, New Delhi and entire sale consideration sum of Rs 2.5 Lakhs stood paid, nothing being outstanding. In lodged report Ex PW1/A, complainant (PW1) alleged of the accused Ravi Kant and Sandeep after having hurled abuses said, "Lala tu aise nahi manega". Complainant (PW1) deposed that accused Sandeep and Ravi Kant on the fateful night in quarrel had said, "lala tujhe sabak sikhayenge, bagair sabak ke tu paise nahi dega". On said count, PW1 was confronted and contradicted with his previous statement Ex PW1/A in the course of his cross examination.

37.Occurrence is alleged to be at a busy market place where liquor shop was open and public persons were present there. Gopal Dass Bansal (PW2) also stated that there were few customers at his own shop. None amongst the public persons, independent witnesses were joined in investigation nor cited as prosecution witness. ASI Subhash Chand (PW3), investigating officer did not whisper of having met Inderdev Choudhary (PW6) at the scene of crime, later till apprehension of accused Ravi Kant and Shyam Lal. Statement under Section 161 Cr.P.C of Inderdev Choudhary (PW6) is of date 28/07/2008 and PW6 in the course of his testimony admitted to be a tutored witness. There is every possibility of Inderdev Choudhary (PW6) to have been introduced as a prosecution witness at the instance of complainant/injured Mahavir Prasad (PW1)."

6 The possibility of the accused having been assaulted by 10-20 boys and having been robbed of his cash was well made out but whether the accused persons were responsible for this offence did not stand established. The FIR was registered after circumspection and scrutiny

the next day i.e. after a delay of three hours. The third accused Shyam Lal had been identified in Court alone for the first time. No TIP had also been conducted qua him. It is also not the case of the prosecution that the third accused Shyam Lal was known to the complainant. The Court was thus of the view that the accused persons are entitled to benefit and a consequent acquittal.

7 This Court does not find any infirmity in the order passed by the Sessions Judge. In fact the learned counsel for the petitioner has not been able to draw attention of this Court to any such perversity. The written submissions filed by the learned counsel for the petitioner have also been perused and no such infirmity can be noted.

8 Appeal is without any merit. Dismissed.

INDERMEET KAUR, J

AUGUST 13, 2015
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